

1 HONORABLE RICHARD A. JONES  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 LEWIS DEAN ARMSTRONG,  
11  
12 Petitioner,

13 v.  
14  
15 UNITED STATES OF AMERICA,  
16  
17 Respondent.

18 Case No. 2:20-cv-00609-RAJ

19  
20 **ORDER DENYING  
21 CERTIFICATE OF  
22 APPEALABILITY**

23  
24 **I. INTRODUCTION**

25 This matter comes before the Court on a referral notice from the Ninth Circuit  
26 Court of Appeals. Dkt. # 32. That notice instructed this Court to grant or deny Petitioner  
27 Lewis Dean Armstrong a certificate of appealability. Dkt. # 32. For the reasons below,  
28 the Court **DENIES** Mr. Armstrong a certificate of appealability.

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30 **II. DISCUSSION**

31  
32 **A. Procedural History**

33 On April 18, 2020, Mr. Armstrong filed a habeas petition in this action under 28  
34 U.S.C. § 2255. Dkt. # 1. In that petition, he sought to vacate, set aside, or correct his  
35 sentence in a separate, criminal action, *U.S. v. Armstrong*, No. 2:13-cr-00322-RAJ-1  
36 (W.D. Wash. June 19, 2020) (Dkt. ## 13, 52). *Id.* The government later moved to  
37 dismiss the petition. Dkt. # 6. It argued that the petition was premature under *United*  
38 *States v. LaFromboise*, 427 F.3d 680 (9th Cir. 2005). *Id.*

39 The Court agreed and dismissed Mr. Armstrong's petition without prejudice

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41 ORDER – 1

1 because it was premature. Dkt. # 25. The Court explained:

2 Petitioner Lewis Dean Armstrong was previously charged and  
 3 convicted for aggravated sexual abuse of a child in violation of 18 U.S.C.  
 4 §§ 1153, 2241(c), 2246(2)(B). *U.S. v. Armstrong*, No. 2:13-cr-00322-RAJ-  
 5 (W.D. Wash. June 19, 2020) (Dkt. ## 13, 52). At sentencing, Judge John  
 6 Coughenour sentenced Mr. Armstrong to a 20-year term of  
 7 incarceration, with a lifetime of supervised release to follow. *Id.* (Dkt. #  
 8 115). Judge Coughenour determined that the thirty-year mandatory  
 9 sentence would be unconstitutional as applied to this case. *Id.* (Dkt. # 117).

10 . . . The Ninth Circuit reversed the judgment, in part, holding that the  
 11 “district court erred in determining that the mandatory minimum sentence  
 12 under 18 U.S.C. § 2241(c) violated the Eighth Amendment” and that the  
 13 mandatory minimum sentence was in fact proportionate. *Id.* (Dkt. # 218 at  
 14 5-6). Two months later, the Ninth Circuit issued its mandate. *Id.* (Dkt. #  
 15 221). Following appeal, this Court has not yet resentenced Mr. Armstrong  
 16 or amended his previous judgment. Mr. Armstrong’s resentencing is  
 17 currently scheduled for October 23, 2020.

18 After receiving the Ninth Circuit’s decision but before receiving the  
 19 mandate, Mr. Armstrong filed this action, moving to vacate, set aside, or  
 20 correct his sentence under 18 U.S.C. § 2255. Dkt. # 1. . . .

21 . . . .  
 22 Since the Ninth Circuit reversed and remanded to this Court, Mr.  
 23 Armstrong has yet to be resentenced, and the Court has not yet amended its  
 24 previous judgment. Once those events occur, Mr. Armstrong will be able  
 25 to challenge the judgment by direct appeal if he chooses. After direct  
 26 appellate review is exhausted, Mr. Armstrong’s motion will become ripe  
 27 for the Court. Until then, it is premature and dismissed without prejudice.

28 *Id.*

29 The Court reached that conclusion by applying *United States v. LaFromboise*, 427  
 30 F.3d 680 (9th Cir. 2005). In *LaFromboise*, the Ninth Circuit explained that a district  
 31 court may not “entertain” a habeas petition until “direct appellate review [has been]  
 32 exhausted.” *Id.* at 686. Direct appellate review is “exhausted” only when “*the district*  
 33 *court has acted on remand* and the time has passed for appealing the district court’s  
 34 action.” *Id.* at 685 (emphasis in original) (quoting *United States v. Colvin*, 204 F.3d  
 35 845, 852 (9th Cir. 2000)).

1 1221, 1226 (9th Cir. 2000)). Here, given that the Court had not yet resentenced Mr.  
 2 Armstrong or amended its previous judgment, the Court had not yet “acted on remand.”  
 3 Dkt. # 25. The Court thus concluded that Mr. Armstrong’s habeas petition was  
 4 premature and must be dismissed. *Id.*

5 More than a month later, Mr. Armstrong filed a notice of appeal. Dkt. # 30.  
 6 Though unclear, it appears that he is appealing this Court’s dismissal order. *Id.* at 2 (“I  
 7 want to appeal there [sic] denial to [sic] my motions and petitions.”).

8 Observing that this Court has not issued or declined to issue a certificate of  
 9 appealability, the Ninth Circuit remanded “for the limited purpose of granting or denying  
 10 a certificate of appealability at the court’s earliest convenience.” Dkt. # 32.

11 **B. Analysis**

12 The Court declines to issue Mr. Armstrong a certificate of appealability. Pursuant  
 13 to 28 U.S.C. § 2253(c) and *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997),  
 14 the Court declines to issue a certificate because the Court’s dismissal of Mr. Armstrong’s  
 15 petition was entirely procedural, not substantive. The Court has not yet considered the  
 16 merits of Mr. Armstrong’s petition. And it has not done so for good reason. Under  
 17 *LaFramboise*, the Court may not “entertain” Mr. Armstrong’s petition until he has been  
 18 resentenced and appellate review has been exhausted. Indeed, the Court may even lack  
 19 the jurisdiction in the first place. *LaFromboise*, 427 F.3d at 686 n.9 (“There is some  
 20 dispute whether this rule reflects a jurisdictional bar or simply a prudential concern. We  
 21 need not resolve this discrepancy, however, because the district court should refrain from  
 22 hearing LaFromboise’s § 2255 motion until after he exhausts his direct appellate review  
 23 rights under either theory.” (citations omitted)).

24 Given the facts of this case, § 2253 is a poor fit, and a certificate of appealability  
 25 should not issue. In *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003), the United States  
 26 Supreme Court explained that “a prisoner who was denied habeas relief in the district  
 27 court must first seek and obtain a [certificate of appealability]” before a circuit court may  
 28

1 entertain an appeal. A certificate will only be issued “if the requirements of § 2253 have  
 2 been satisfied.” *Id.* Under § 2253, a petitioner must make a “substantial showing of the  
 3 denial of a constitutional right.” *Id.* That requires a petitioner to show that “reasonable  
 4 jurists could debate whether (or, for that matter, agree that) the petition should have been  
 5 resolved in a different manner or that the issues presented were adequate to deserve  
 6 encouragement to proceed further.” *Id.* (internal quotation marks omitted) (quoting *Slack*  
 7 *v. McDaniel*, 529 U.S. 473, 484 (2000)).

8 To determine whether a petitioner has made a “substantial showing,” a court must  
 9 “look to the District Court’s *application* of [the habeas corpus statute] to petitioner’s  
 10 constitutional claims and ask whether that *resolution* was debatable amongst jurists of  
 11 reason.” *Id.* (emphasis added). Put differently, “[w]here a district court has rejected the  
 12 constitutional claims *on the merits*, the showing required to satisfy § 2253(c) is  
 13 straightforward: The petitioner must demonstrate that reasonable jurists would find the  
 14 *district court’s assessment of the constitutional claims* debatable or wrong.” *Slack*, 529  
 15 U.S. at 484.

16 Here, the Court has not yet applied the habeas corpus statute, it has not yet  
 17 assessed Mr. Armstrong’s constitutional claims, and it has not resolved his petition on the  
 18 merits. Section 2253 hardly applies.

19 Setting that aside and looking at § 2253(c)(2)’s plain terms, Mr. Armstrong has  
 20 not met his burden. To date, Mr. Armstrong has made no showing—let alone a  
 21 “substantial showing”—that he was denied a constitutional right. 28 U.S.C. § 2253(c)(2).  
 22 He has not done so because his petition was not ripe and because the Court dismissed it  
 23 without prejudice before it could reach the merits.

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28 ORDER – 4

### III. CONCLUSION

For the reasons stated above, the Court **DENIES** Mr. Armstrong a certificate of appealability. The Court **ORDERS** the Clerk to forward this order and the record to the Ninth Circuit.

DATED this 5<sup>th</sup> day of March, 2021.

Richard D. Jones

The Honorable Richard A. Jones  
United States District Judge